Supreme Court, U.S.
FILED

10-60 MAY 28 2010

No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

STEVEN A. MAHER,

Petitioner,

vs.

BANK ONE, N.A., and BENJAMIN T. RUBAL and KATHY G. RUBAL, husband and wife,

Respondents.

On Petition for a Writ of Certiorari To the Arizona State Supreme Court and the Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Arizona statutes governing trustee's sales and trustee's deeds upon sale, which have been interpreted by the Arizona courts as requiring that any and all challenges to the validity of a sale be made prior to the day of the sale and result in the issuance of a judicial injunction prohibiting the sale, violate the due process clause of the 14th Amendment to the United States Constitution, either in general or as specifically applied to Petitioner?

2. Does a lender's violation of the debt validation provisions of the Fair Debt Collection Practices Act, 15 U.S.C. §1692g(b), render void or voidable subsequent attempts to collect the debt, including the conducting of a trustee's sale under state law, in addition to providing the debtor a damages remedy?

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PETITION FOR A WRIT OF CERTIORARI

Steven A. Maher respectfully petitions for a writ of certiorari to review the unreported Memorandum Decision of Division Two of the Arizona Court of Appeals and the discretionary denial of relief on Petition for Review by the Arizona State Supreme Court.

OPINIONS BELOW

The opinions below are unreported. The orders of the courts below are included in Appendices B, C, D, and E. An order in a related case is included in Appendix A.

JURISDICTION AND COMPLIANCE WITH RULE 29.4 (c)

The Arizona Supreme Court denied review on March 2, 2010. *See* Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Because the Petition challenges the constitutionality of an Arizona state statute, A.R.S. §33-811(C), and no agency, officer, or employee of the State of Arizona is a party to this proceeding, 28 U.S.C. § 2403 (b) may apply. A copy of the Petition has, therefore, been served on the Attorney General of the State of Arizona, as required by U.S. Supreme Court Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the due process clause of the United States Constitution, 14th Amendment, and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g(b). The text of the constitutional provision is attached as Appendix F and the text of the statutory provision is attached as Appendix G. The text of a pertinent section of the Arizona Revised Statutes, A.R.S. §§33-811(B) and 33-811(C), is attached as Exhibit H.

I. STATEMENT OF THE CASE

Petitioner Steven A. Maher filed a civil action against Respondents in Arizona state court in 2006, challenging the taking of his residence by trustee's sale and forcible entry in 2003. The trial court denied his motion for summary judgment and granted Respondents' cross-motions for summary judgment. Maher's appeal to the Arizona Court of Appeals, Division Two, was denied in an unpublished Memorandum Decision. Maher's Petition for Review to the Arizona Supreme Court was denied. Before the trial court and state appellate court, Maher raised various federal issues, including the constitutionality of the state statute at issue and the effect the Fair Debt Collection Practices Act.

II. STATEMENT OF FACTS

In 1999, Maher obtained a loan on his residence from Bank One Arizona, N.A., secured by a deed of

trust. In 2003, a dispute developed between Maher and the bank relating to the bank's release of confidential information about the loan. Maher withheld payments and attempted to resolve the dispute. Another entity, Bank One, N.A., engaged in debt collection activity, then noticed a trustee's sale in July, 2003. Despite Maher's objections, the sale went forward in October, 2003.

In November, 2003 Bank One, N.A., filed an forcible entry action for possession, alleging it was successor by merger to Bank One Arizona, N.A. In defense, Maher alleged, *inter alia*, that the bank lacked title to the property, because Bank One, N.A., was not the successor by merger to Bank One Arizona, N.A., and had not acquired any rights under the deed of trust. The Arizona Superior Court rejected Maher's arguments and issued a writ of restitution. Maher was dispossessed in April, 2004, and the bank sold the property to Kathy and Benjamin Rubal.

The Arizona Court of Appeals dismissed Maher's appeal as moot, ruling that he could not raise these defenses in a forcible entry action, though he could do so in a separate quiet title or damages action. Appendix A at p. 6, n 1.

Maher filed a civil action in the Arizona Superior Court in 2006. Chase Home Finance (CHF) answered as successor by merger to Bank One, N.A. Maher sought to quiet title in CHF and the Rubals and to recover damages from CHF for breach of contract, violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692g(b), violation of provisions of Arizona state law relating to trustee's sales, and under tort theories. The parties filed cross motions for summary judgment. Maher produced

supporting documents including documents obtained from the United States Office of the Comptroller of the Currency (OCC) regarding the 2001 merger that had purportedly created Bank One, N.A. Merger documents referred the entity as "Bank One, N.A., Chicago, Illinois." Based on this and other evidence, Maher argued that: (1) Bank One, N.A. lacked standing to enforce the deed of trust; (2) the Rubals were not bona fide purchasers for value and even if they were, were not protected from a quiet title action; (3) the bank violated the FDCPA; and (4) the bank violated provisions of A.R.S., Title 33, Chapter 6.1 relating to trustee's sales.

CHF and the Rubals argued that Bank One, N.A., had standing because it was the successor by merger to Bank One Arizona, N.A., and because issuance of a trustee's deed created a presumption of compliance with the statutory requirements, citing A.R.S. §§33-811(B) and 33-811(C). Despite discovery requests, CHF produced no documents to show that Bank One, N.A., was the successor to Bank One Arizona, N.A.[1]

The trial court granted summary judgment in favor of Respondents, denying Maher his right to a jury trial under the state and federal constitutions. *See Valler v. Lee,* 190 Ariz. 391, 949 P.2d 51 (Ariz.

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[1]The reference in the trial judge's orders to "two letter" showing that the true name of the bank was "Bank One, N.A.," is misleading. These were subsequent references in unofficial notification letters that referred back to earlier parts of the letters in which the bank was identified by its true name, which was "Bank One, National Association, Chicago, Illinois." There "hereinafter" references provided no support for the Respondents' position.

App. 1997). The court ruled that Maher could not raise the Title 33 claims because he had not filed a prior legal action to stop the sale. The court also ruled that, as to these claims, the trustee's deed upon sale established a presumption, perhaps conclusive, of the regularity of the sale and compliance with statutory procedures. The court rejected Maher's FDCPA allegations, stating that the Act did not apply to a creditor attempting to collect its own debt. However, on the standing issue, the court reached the facts and ruled in favor of Appellees on grounds that there were no material issues of fact and they were entitled to judgment as a matter of law. Appendix E.

During briefing of the cross-motions, Maher's discovery requests to Appellees became due. These sought information about the merger and CHF's claim that its predecessor was the successor in interest to Bank One Arizona, N.A. This discovery was never answered. At the oral argument, Maher called this to the trial court's attention and asked it to defer ruling. Maher renewed this request on motion for new trial. The discovery was never produced.

Maher filed two motions for new trial. With the motions, Maher provided newly discovered documents from the title company and real estate brokerage that handled the sale to the Rubals. He argued that Bank One, N.A., was not an entity that came from the merger of 2001, and that, therefore, CHF's assertion that it was the successor by merger to Bank One Arizona, N.A., failed. Maher also argued that the court should not have decided the cross-motions for summary judgment while discovery was pending, because that discovery related to Bank One, N.A.'s authority to enforce the original contact. Maher

provided the trial court with substantial evidence that the entity to emerge from the 2001 merger was called Bank One, N.A., Chicago Illinois, not Bank One, N.A. Maher also showed that Bank One, N.A., Chicago, Illinois, lacked authority to transact business in Arizona for ten years prior to September, 2008.

The court relied on a single reference in a letter from the OCC to Bank One Corporation which, after referring to the new entity by its correct name, Bank One, N.A., Chicago, Illinois, used the short-hand reference, "Bank One, N.A." On this basis, the trial court denied Maher's motion for new trial, finding that summary judgment must stand on the strength of the letter from the OCC referring to "Bank One, N.A." Implicitly, the court found that this letter removed any issue of disputed fact as to the legal authority of the bank to conduct a trustee's sale, issue a deed, obtain a writ of restitution, dispossess Maher, and sell the property. Appendix D.

Maher's second motion for new trial included an official OCC decision approving the 2004 merger of Bank One, N.A., Chicago, Illinois and Bank One, N.A., Columbus, Ohio, with J.P. Morgan Chase Bank, providing further factual support for Maher's position. This motion was also denied and judgment was entered in Respondents' favor. Appendix D.

The Arizona Court of Appeals upheld the judgment. Appendix C. The appellate court never reached the factual issues upon which the trial court ruled. Rather, it ruled that, pursuant to A.R.S. §33-811(C), Maher had waived any claim of relief related to the trustee's sale by failing to obtain a preliminary injunction prior to the sale. Appendix C, ¶20. The appellate court rejected on other grounds Maher's

claims under the FDCPA and for breach of contract and his challenge to the trial court's failure to require Appellee's to respond to discovery. Appendix C, ¶¶25, 29-31.

Maher sought discretionary review by the Arizona Supreme Court, the highest state appellate court. He raised the following issues, *inter alia*: (1) if A.R.S. §33-811(c) was correctly interpreted by the trial court and the court of appeals to bar any challenge to a trustee's sale if an injunction is not obtained prior to the sale, the statute violated Maher's due process rights to notice and a meaningful opportunity to be heard under the 14th Amendment to the U.S. Constitution; (2) collection actions taken in violation of the FDCPA verification provisions were void and of no legal effect, rendering the purported sale of the property at trustee's sale and the issuance of a trustee's deed upon sale a nullity. The Arizona Supreme Court denied jurisdiction of the Petition for Review without further comment. Appendix B.

III. REASONS FOR GRANTING THE PETITION

A. Arizona State Statutes Governing Challenges to the Sale of Real Property at Trustee's Sales, as Interpreted by the Arizona Courts, Violate Due Process Under the United States Constitution Because They Provide an Inadequate Process for such Challenges to be Judicially Reviewed.

The Fourteenth Amendment's due process clause provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Constitution, 14th Amendment, §1. *See also*

Arizona Constitution, Art. 2, §4.

Due process requires meaningful notice and opportunity to defend these protected rights. *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306, 314 (1950). In that case, this Court defined due process notice requirements:

> Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.

Id.

Deeds of trust, rather than mortgages, are the primary instrument used in Arizona to secure financing liens on both residential and commercial real property. Deeds of trust are enforced by trustee's sales. When the lender (beneficiary and trustee under the deed) believes the borrower/property owner (the trustor) has violated the terms of the deed of trust, the lender may initiate a trustee's sale, which results in the issuance of a trustee's deed upon sale, transferring title of the property from the borrower to the lender. Unlike mortgage foreclosure, this is entirely an extra-judicial process, taking place without judicial oversight or review. *See Krohn v. Sweetheart Properties, LTD,* 203 Ariz. 205, 52 P.3d 774 (2003).

Arizona statutes govern the issuance of deeds of trust and the conduct of trustee's sales and issuance of trustee's deeds upon sale. This statutory scheme, found in Title 33, Chapter 6.1, Arizona Revised

Statutes, contains various protections for homeowner's whose property may be taken pursuant to a deed of trust. For example, notice must be provided to the property owner by certified mail and the notice must be recorded. Notice must also be published. A.R.S. §33-809. Arizona courts have repeated held that these requirements must be strictly complied with. *See Eardley v. Greenberg,* 164 Ariz. 261, 792 P.2d 724 (1990); *Patton v. First Federal Savings,* 118 Ariz. 473, 578 P.2d 152 (1978). *See also Schaeffer v. Chapman,* 176 Ariz. 326, 329, 861 P.2d 611, 614 (1993) (contractual rights to notice and cure must be satisfied before breach is ripe and property may be sold at trustee's sale).

In 2002, Arizona enacted, as part of this statutory scheme, A.R.S. §33-811(C). This section states as follows:

> The Trustor, its successor or assigns, and all persons to whom the trustee mails a notice of sale under a deed of trust pursuant to §33-809 shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief under Rule 65, Arizona Rules of Civil Procedure, entered before 5:00 p.m. mountain standard time on the last business day before the scheduled day of the sale.

The plain language of this section appears to preclude any defenses or objections to the sale unless the person who has been mailed notice (not necessarily received it) is successful in obtaining a preliminary injunction stopping the sale the day before the sale takes place. No exception is made for (1) persons who were mailed but did not receive the notice; (2) defenses or

objections, the basis for which was not known prior to the day of the sale; or (3) defenses or objections that did not arise until the day of the sale, such as sale for a "grossly inadequate price." *See Krohn v. Sweetheart Properties, LTD, supra* (establishing right, under Arizona law, to challenge sale price bid at trustee's sale as "grossly inadequate.")

As interpreted by the Arizona Courts, A.R.S. §33-811(C) violates Maher's due process property rights. Maher's property was taken without affording him an adequate opportunity to show that the party taking the property had no right to do so. The notice conveyed inadequate information and provided inadequate time to respond and defend. Later, when Maher was able to develop necessary evidence to defend himself, he was denied an opportunity to have it considered by a court. A.R.S. §33-811(C) nullifies the protections of both state law and due process. It also deprives property owner's of the protection of federal consumer law, such as the FDCPA.

A.R.S. §33-811(C) requires only that two notices of a trustee's sale be sent, the earlier as little as 85 days before the sale. *See* A.R.S. §33-809. There is no requirement that the owner actually receive the notices. No allowance is made for owners who, through no fault of their own, fail to receive notice.

Moreover, the statute does not merely require exhaustion of remedies. The owner must not just attempt to obtain injunctive relief under Ariz.R.Civ.P., Rule 65, he must succeed. Thus, the owner must post security and show (1) a strong likelihood of success on the merits; (2) the possibility of irreparable harm if the relief is not granted; (3) a balance of hardships in his favor; (4) when appropriate, advancement of the public

interest. *E.g., Lafaro v. Cahill,* 203 Ariz. 482, 56 P.3d 56 (App. 2002); *Kromko v. City of Tucson,* 202 Ariz. 499, 47 P.3d 1137 (App. 2002). This sets the bar too high. Few homeowners, however legitimate their claims, could stop a wrongful trustee's sale under this standard.

A.R.S. §33-811(C) creates due process problems similar to those found in provisional remedies cases decided by this Court. In *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969), a Wisconsin statute that allowed garnishment of a debtor's wages without notice or an opportunity to be heard was found to violate due process. *See also Fuentes v. Shevin,* 407 U.S. 67, 96 (1972); *Mitchell v. W.T. Grant,* 416 U.S. 600 (1974); *North Georgia Finishing v. Di-Chem,* 419 U.S. 601 (1975).

Arizona courts upheld a provisional remedies statute against a due process challenge where these standards were met. In *Searles v. First Nat'l Bank,* 127 Ariz. 240, 619 P.2d 749 (App. 1980), the Arizona provisional remedies statute was upheld because it provided significant procedural protections, including a bond requirement and judicial review, guided by particular standards, before the property could be taken. The person whose property was taken could also immediately move to quash the order after it was issued and could obtain its return by posting a bond. *Id.,* 127 Ariz. at 245-246.

A.R.S. §33-811(C), however, provides no such safeguards. The sending of notice, recording of notice, conduct of the sale, issuance of the deed – all occur outside the view of any neutral tribunal. There is no right to set aside the sale once it has occurred. The opportunity for post-sale review is essential. If the

statue precludes any such review, it violates due process under the standards set forth in the above cases.

Recently, several judges of the United States District Court, District of Arizona, have had occasion to consider the meaning and constitutionality of A.R.S. §33-811(C), in matters originating in federal court. These judges have reached differing and contradictory results.

In *Martenson v. RG Financing,* 2010 WL 334648 (D. Ariz., January 22, 2010), property was sold at trustee's sale following several bankruptcy-related postponements. Plaintiff/homeowner filed a civil action in U.S. District Court after the trustee's sale and sought a preliminary injunction. Following evidentiary hearing, the District Court granted the injunction, rejecting the financing company's argument that the plaintiff had waived any objections to the trustee's sale because she had not obtained an injunction prior to the sale, pursuant to A.R.S. §33-811(C). The District Court, after reviewing the legislative history of the statute, termed the defendants' interpretation "improbable," finding that such a broad interpretation would contradict other provisions of the statute and overturn established case law. The Court did not reach the due process issue. *Roads v. Washington Mutual Bank,* No. CV10-0197-PHX-NVW (D. Ariz., April 6, 2010).

However, in *Coleman v. American Home Mortgage Servicing, Inc.,* No. CV09-2692-PHX-DGC (D. Ariz. March 29, 2010), the Court rejected a constitutional challenge to A.R.S. §33-811(C) on grounds that it did "not provide a remedy for fraud." The Court held that the remedy was available

provided it was exercised prior to the sale. It is unclear whether or what extent the plaintiff in that case raised a due process challenge to the statute. *See also Breedlove v. America's Servicing Company, et al.*, No. CV09-8135-PCT-JAT (D.Ariz., March 31, 2010).

B. The Fair Debt Collection Practices Act (FDCPA) Should be Interpreted such that Actions Taken in Violation of Provisions of the FDCPA Requiring a Debt Collector to Verify the Validity of the Debt or Cease Collection of the Debt are Void and of no Effect.

The FDCPA, 15 U.S.C. §§1692, *et seq*, sets forth strict requirements for debt collectors, including, in some circumstances, creditors attempting to collect their own debts.[2] These include the requirement that if a person receiving a communication from a debt collector challenges the validity of the debt, all debt collection activity must cease until the collector supplies the consumer with verification. 15 U.S.C.§1692g(b).

Maher showed that he received a communication from the bank's agent and successor trustee and challenged the debt within the 30-day window, but that before the time expired and without providing verification, the bank noticed the trustee's sale and afterward filed the forcible entry action. The

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[2]Maher alleged that Bank One, N.A., was a "debt collector" under the FDCPA, 15 U.S.C. §1692a (6), because it acted through an agent/successor trustee, using a name other than its own and thereby falsely indicating that a third party was attempting to collect the debt. *See Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir., 1997).

bank never provided the required verification.

A trustee's sale is collection activity covered by the FDCPA. *See Shapiro & Meinhold v. Zartman,* 823 P.2d 120 (Colo. 1992). Litigation may also be subject to FDCPA requirements. *See Heintz v. Jenkins,* 514 U.S. 291 (1995); *Tolentino v. Friedman,* 46 F.3d 645 (7th Cir., 1995) (notice served with summons must meet FDCPA requirements). Although 15 U.S.C. §1692g(b) may not prohibit the filing of a lawsuit before obtaining validation, other collection activity, including a trustee's sale, would be prohibited.

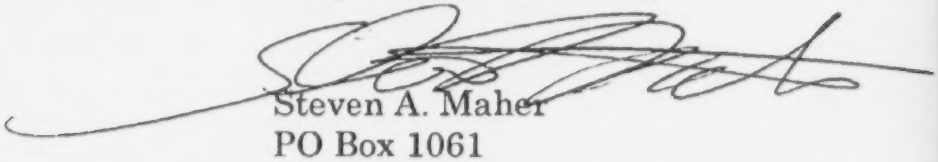
Neither the trial nor the appellate court considered whether Bank One, N.A., had legal authority to take collection action when it had failed to verify the validity of the debt. The bank's failure to meet these legal requirements invalidated any title it obtained from the trustee's sale. See 15 U.S.C. §1692n (FDCPA preempts state laws providing less protection).

Petitioner is aware of no reported federal case addressing the issue of whether violation of this section, or any section, of the FDCPA precludes and nullifies further collection activity, in addition to creating a claim for damages or the grounds for injunctive relief. Considering the broad remedial purpose of the FDCPA, this Court should interpret the Act to include such preclusive effect.

IV. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

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MEMORANDUM DECISION
September 30, 2005. . . . . .A-1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BANK ON, NA, successor by merger to Bank One, N.A., a national banking association,	)	2CA-CV 2004-0201 DEPARTMENT A
Plaintiff/Appellee,	)	MEMORANDUM DECISION
v.	)	Not for Publication Rule 28, Rules of Civil Appellate Procedure
STEVEN MAHER,	)	
Defendant/Appellant	)	

APPEAL FROM THE SUPERIOR COURT OF
GRAHAM COUNTY

Cause No. CV2003-165

Honorable C. Robert Pursley, Judge Pro Tempore

APPEAL DISMISSED

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Plaintiff/Appellee

David Lipartito Tucson
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Defendant/Appellant

ECKERSTROM, Judge.

¶1 Appellant Steven A. Maher, the defendant in this forcible detainer action instituted by plaintiff/appellee Bank One, NA (Bank One), challenges the trial court's order requiring him to vacate the subject property. But, because the property has been sold to a third party, and therefore Maher could not regain possession, the only remedy in a forcible detainer action, we dismiss the appeal as moot.

¶2 Bank One, Arizona, N.A. (Bank One, Arizona) became the trustee of Maher's home in 1999 when he opened a home equity line of credit with the bank. In March 2003, Maher stopped making payments on the account. Maher claimed that the bank gave his estranged wife information about the account and thereby violated its duty to maintain the confidentiality of his financial information. Maher asserted that the provisions of his contract with Bank One, Arizona entitled him to withhold payments when he had a billing dispute and he maintained that the alleged violation of his confidentiality created such a dispute.

¶3 The house was sold to Bank One at a trustee's sale in October 2003. Bank One filed a forcible detainer action after Maher failed to vacate the premises. In response, Maher contested the validity of the trustee's sale, claiming that Bank One had no right to conduct the sale because it was a different entity than Bank One, Arizona, the entity he had contracted with, and that Bank One blatantly had violated not only conditions of the contract, but also Arizona Law, federal law, and the bank's own charter. Maher admitted that he had violated the agreement by not making payments and did not claim he had any dispute about the amount owed or credit for payments made.

¶4 The trial court found Maher guilty of forcible detainer and ordered him to vacate the premises. Maher filed a notice of appeal, along with a document entitle "Appeal Bond," in which he attempted to use the property in question as a bond. The trial court ruled that Maher could not pledge the property as his bond and that pursuant to Rule 10, Ariz. R. Civ. App. P., 17B A.R.S., he needed to post a bond in the amount of $500 to cover the costs on appeal. After Maher paid the bond, the trial court "stay[ed] the execution of the judgment until further notice of the Court of Appeals." The next day, however, the court issued a minute entry stating that it "was unaware when it issued its earlier stay of execution that, in accordance with the earlier

order of the Court, the judgment had been executed and ownership and possession of the property transferred to [Bank One]" and that any further request for relief would have to be from this court. The trial court later noted that it had not considered the $500 bond a supersedeas bond, but rather, a cost bond.

¶5 This court dismissed the appeal *sua sponte*, as we found that Maher had not filed a timely notice of appeal. Thereafter, when no stay was in place, Bank One sold the property to a third party. Maher than moved this court for permission to file a delayed appeal, and we denied the motion "with leave to seek relief in Graham Co. Superior Court." The trial court found that because it had treated Maher's motions for reconsideration as motions for new trial, which tolled the time for filing a note of appeal, Maher's notice of appeal had been timely filed. This appeal followed.

¶6 Maher argues, as he did below, that the trustee's sale was invalid, and therefore the trial court erred by terminating his right to possession because Maher did not receive notice of Bank One's merger with Bank One, Arizona or notice of the trustee's sale, and because Bank One, Arizona's breach of confidentiality was a legitimate basis for him to withhold payments. Maher also argues that the trial court erred by denying his second motion for continuance and by not holding an evidentiary hearing on the

defenses and counterclaims he had raised. Finally, he alleges that Bank One violated the stay of execution, requesting that this court impose sanctions against it.

¶7 The only issue to be decided in a forcible detainer action is whether the plaintiff has the right of actual possession. A.R.S. § 12-1177(A); *United Effort Plan Trust v. Holm*, 209 Ariz. 347, ¶ 21, 101 P.3d 641, 645 (App. 2004). Accordingly, "the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff." *Holm*, 209 Ariz. 347, ¶ 21, 101 P.3d at 645. Because Bank One has sold the property to a third party and because dismissal of Bank One's complaint would not entitle Maher to re-enter that third party's property, the appeal is moot. *See Hall v. World Sav. & Loan Ass'n*, 189 Ariz. 495, 504, 943 P.2d 855, 864 (App. 1997)(case moot where change in circumstances would render action by reviewing court useless); *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229, 696 P.2d 1376, 1378 (App. 1985)("A case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights." Maher argues that "[d]ifficulties in formulating a remedy, even a partial one, do not render a controversy moot." But he cites no Arizona case for that proposition, and the cases he relies on from other jurisdictions do not involve forcible detainer, or any other such

limited action. Nor does he articulate a concrete legal theory under which we could formulate a remedy. Thus, we do not find his position persuasive.

¶8 Relying on *Pointe Resorts, Inc. V. Culbertson*, 158 Ariz. 137, 141, 761 P.2d 1041, 1045 (1988), Maher also argues that "[a] litigant cannot, by its own voluntary conduct, 'moot' a case and deprive a court of jurisdiction." But that case merely stated, without analysis, that "*usually a defendant* cannot by its own voluntary conduct 'moot' a case." *Id.* (Emphasis added). We find that reasoning inapplicable to this case for several reasons. First, Bank One was not the defendant in the underlying lawsuit, but rather, the plaintiff and the prevailing party below. Second, *Pointe Resorts* emphasized that the doctrine of mootness is "founded in part on policy considerations and the questions of mootness is one of convenience and judicial discretion." *Id.* Thus, the supreme court viewed the voluntary conduct question as merely one public policy factor a court must "usually" consider in determining whether to address the issue. Third, it was Maher's own conduct in failing to secure the appropriate stay that caused his claim to become moot–not Bank One's conduct in exercising its lawful right to sell property that belonged to it. Under the circumstances, we can discern no logical public policy consideration that would cause us to address the moot dispute in this case.

See Fraternal Order of Police Lodge 2 v. Phoenix Employee Relations bd., 133 Ariz. 126, 127, 650 P.2d 428, 429 (1982) (courts should refrain from considering moot questions except to consider question of "great public importance" or "one which is likely to recur").

¶9 Maher maintains that the trial court considered the defenses and counterclaims he had raised on their merits and that Bank One had litigated them and, thus, we should now consider them on appeal. However, in an action for forcible detainer, "counterclaims, offsets and cross complaints are not available either as a defense or for affirmative relief in such action." *Olds Bros. Lumber Co. V. Rushing,* 64 Ariz. 199, 205, 167 P.2d 394, 399 (1946). And, for us to address Maher's other arguments would defeat the purpose of a forcible detainer action, which is to "afford a summary, speedy and adequate remedy for obtaining possession of the premises [wrongfully] withheld."[1] *Phoenix-Sunflower Indus., Inc. V. Hughes*, 105 Ariz. 334, 336, 464 P.2d 617, 619 (1970). In any event, the record does not support Maher's conclusion that the trial court ruled on the merits of his defenses

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[1]Bank One is correct in noting that Maher can bring a separate action to quiet title, in which he can litigate his other issues. *See Mason v. Cansino*, 195 Ariz. 465, ¶ 8, 990 P.2d 666, 669 (App. 1999) (issues of title cannot be litigated in forcible detainer action; appropriate vehicle separate action to quiet title).

and counterclaims. Rather, the court addressed such issues only to the extent necessary to find them irrelevant to the right of possession.

¶10 Maher also claims that a stay was in place and that Bank One violated that stay when it sold the property, thus creating the mootness "through its wrongful action." But Bank One did not cause the case to become moot by violating a stay. Although the trial court's initial order purporting to stay execution of the judgment may have been misleading, the court retracted tit the next day and clarified in an order signed one week later that it had not considered the $500 a supersedeas bond, but a cost bond. A supersedeas bond would have been required to stay execution of the writ of restitution that evicted Maher from the property. *See Anderson v. Pickrell*, 115 Ariz. 589, 590, 566 P.2d 1335, 1336 (1977)(filing supersedeas bond stays execution of judgement pending appeal). With no stay in place, Bank One was entitled to sell the property, and therefore, it did not create the mootness through any wrongful conduct. To the contrary, it was incumbent on Maher to seek the appropriate stay against Bank One if he wished to prevent Bank One from exercising its legal right to dispose of its property as it saw fit.

¶11 In the same vein, Maher asks us to sanction Bank One for selling the underlying property

on the grounds that it did so in violation of a stay. As noted above, however, Maher had not properly stayed enforcement of the trial court's order. Therefore, Bank One engaged in no conduct we would sanction on that ground.

¶12 Because the dispute in this case has been rendered moot by Bank One's lawful sale of the underlying property to a third party, we dismiss Maher's appeal.

PETER J. ECKERSTROM, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR. Judge

APPENDIX B

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Order denying Appellant's Petition for Review. . .B-1

SUPREME COURT

STATE OF ARIZONA

March 3, 2010

RE: STEVEN MAHER v BANK/RUBAL
Arizona Supreme Court No. CV-09-0300-PR
Graham County Superior court No. CV2006193

GREETINGS;

The following action was taken by the Supreme Court of the State of Arizona on March 2, 2010, in regard to the above-referenced cause:

ORDERED: Appellant's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 3rd day of March, 2010.

Rachelle M. Resnick, Clerk

TO:
Jeffrey P Handler
Roger W Frazier
Jonathan Brinson
Jeffrey P Handler
adc

APPENDIX C

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MEMORANDUM DECISION
August 20, 2009. . . . . .C-1

IN THE COURT OF APPEALS

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEVEN MAHER, Plaintiff/Appellant, v. BANK ONE, N.A., a foreign corporation; BENJAMIN T. RUBAL and KATHY G. RUBAL, husband and wife, Defendants/Appellees.	)	2 CA-CV 2008-0193 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF
GRAHAM COUNTY

Cause No. CV2006-193

Honorable C. Robert Pursley, Judge Pro Tempore

AFFIRMED

David Lipartito	Tucson Attorney for Appellant
Bryan Cave LLP By Jonathan G. Brinson and Steven A. Hirsch	Phoenix Attorneys for Defendant/ Appellee Bank One
Gust Rosenfeld, P.L.C. By Roger W. Frazier and Mark L. Collins	Tucson Attorneys for Defendants/ Appellees Rubal

BRAMMER, Judge.

¶1 This case arises from the foreclosure by appellee Bank One, N.A. (Bank One) of a deed of trust on a house owned by appellant Steven Maher, and the subsequent purchase of the house by appellees Benjamin and Kathy Rubal (the Rubals). Maher filed an action raising various claims against Bank One and the Rubals, and seeking to restore title to the house in his name and recover damages. On appeal, Maher asserts the trial court erred in granting summary judgment in favor of Bank One and the Rubals. We affirm.

Factual and Procedural Background

¶2 The following facts are undisputed. In 1999, Bank One, Arizona, N.A. (Bank One, Arizona)

became the trustee under a deed of trust on Maher's house in Safford, Arizona, securing a home equity line of credit he had obtained from the bank. In March 2003, Maher stopped making payments on the line of credit's outstanding loan balance. Maher claimed the bank had given his wife information about the account and thereby violated its duty to maintain the confidentiality of his financial information. Maher asserted the provisions of his contract with Bank One, Arizona entitled him to withhold payments when he had a billing dispute and that the alleged violation of his confidentiality created such a dispute.

¶3 From April through June, 2003, Bank One, acting as successor in interest to Bank One, Arizona, sent Maher at least eight letters from its Wisconsin and Illinois offices, notifying him his account was past due and requesting he contact the bank so it could "discuss [his] situation and offer solutions to help resolve th[e] matter." The bank apologized for having sent Maher's wife information about his account and assured him it would no longer do so, but stated it would "not relieve [him] of [his] contractual obligation to satisfy the [loan]." In response, Maher alleged that, because he had only contacted Bank One representatives in Arizona and Illinois, he "ha[d] no idea" who had sent the Wisconsin letters or whether they were "for real." Maher stated he would "consider any future

communications from [the Wisconsin office] as harassment" and refused to make any loan payments.

¶4 In July 2003, Bank One recorded a "Notice of Trustee's Sale," stating Maher's house would be sold at auction on October 16, 2003. Also in July, Bank One sent Maher several letters by certified mail informing him of the planned sale, but each letter was returned as "unclaimed." The bank published the notice of sale in the local newspaper in Safford once a week for four weeks in August and September 2003. In September, Bank One sent Maher a "remind[er]" that his house would be sold in October and requested that he "vacat[e] the premises." Although Maher attended the trustee's sale and "object[ed] to it," his house was sold to Bank One.

¶5 After Maher failed to leave the house, Bank One filed a forcible detainer action against him. In response, Maher contested the validity of the trustee's sale, claiming that Bank One had no right to conduct the sale because it was a different entity than Bank One, Arizona, the entity with which he had contracted, and that Bank One had violated not only conditions of the contract but also Arizona law, federal law, and the bank's own charter. Maher admitted that he had violated the agreement by not making payments and did not claim he had any dispute about the amount owed.

¶6 The trial court found Maher guilty of forcible detainer and ordered him to vacate the premises. Thereafter, Bank One sold the house to the Rubals. On appeal from the trial court's decision, Maher argued, inter alia, that the trustee's sale was invalid and, therefore, the trial court had erred by terminating his right to possession because he had not received notice of Bank One's merger with Bank One, Arizona or notice of the trustee's sale, and because Bank One, Arizona's breach of confidentiality was a legitimate basis for him to withhold payments. In a memorandum decision, we determined that the "only issue to be decided in a forcible detainer action is whether the plaintiff has the right of actual possession" of the property. *Bank One, N.A. v. Maher,* No. 2CA-CV 2004-0201, ¶ 7 (memorandum decision filed Sept. 30, 2005). And, "[b]ecause Bank One ha[d] sold the property to [the Rubals] and because dismissal of Bank One's complaint would not entitle Maher to re-enter that third party's property, the appeal [wa]s moot." *Id.* We noted, however, that Maher could "litigate his other issues" in "a separate action to quiet title." *Id.*n.10.

¶7 In July 2006, Maher filed a complaint against Bank One seeking to quiet title to the house. As additional causes of action, Maher claimed Bank One had breached its contract with him; had trespassed on and wrongfully converted his property; had violated the federal Fair

Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 through 1692p; and had violated various provisions of Title 33, A.R.S. Maher requested damages for each of these additional claims and also sought punitive damages "[a]s to all counts...in an amount sufficient to deter [Bank One] and others from similar acts in the future." He also asserted Title 33 required the court to "declare the...trustee's deed, and all subsequent conveyances, void and of no effect." Maher later amended his quiet title complaint to add the Rubals as defendants.

¶8 Maher moved for summary judgment on all counts, arguing the law and evidence showed: Bank One was not entitled to foreclose its deed of trust on his house because it was not the successor in interest to Bank One, Arizona; the Rubals were not bona fide purchasers of the house; Bank One improperly foreclosed its deed of trust while his dispute was still pending; Bank One had engaged in unfair debt-collection practices; and Bank One had failed properly to notify him of the trustee's sale. Bank One and the Rubals both filed cross-motions for summary judgment against Maher.

¶9 After oral argument, the trial court entered summary judgment in favor of Bank One and the Rubals, awarded them their costs and attorney fees, and ordered Bank One "to prepare a form of judgment, attaching thereto

affidavits from both [it and the Rubals] regarding attorney's fees." Maher twice moved for a new trial pursuant to Rules 59 and 60, Ariz. R. Civ. P., and the court denied both motions. The court then entered final judgment in favor of Bank One and the Rubals, awarding them a collective total of $87,191.10 in costs and attorney fees. This appeal followed.

Discussion

¶10 Maher contends the trial court erred in granting summary judgment in favor of Bank One and the Rubals. Summary judgment is proper when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301,309,802P.2d 1000, 1008 (1990). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶8, 156 P.3d 1157, 1160 (App.2007).

¶11 We first observe that, although all the parties

generally requested judgment in their favor on all claims, none of the parties specifically discussed two of Maher's claims in their summary judgment or new trial motions and responses filed below: Maher's claim that Bank One was liable for conversion and trespass for holding the trustee's sale, pursuing the forcible detainer action to evict him from the property, and subsequently selling the property to the Rubals; and his claim that Bank One breached its contract with him by "failing and refusing to send [him] notices...at his correct address" despite his having provided Bank One a new mailing address. Nor did the trial court discuss these claims in its orders granting Bank One's and the Rubals' motions for summary judgment or in denying Maher's motions for new trial. The court, nonetheless, granted final judgment in favor of Bank One and the Rubals on "the Complaint filed by...Maher." Because Maher does not argue on appeal that the court erred in doing so, he has abandoned these claims, and we do not address them.

Sections 33-811(C), A.R.S.

¶12 Bank One and the Rubals assert that, pursuant to § 33-811(c), Maher waived his remaining claims by failing to seek a preliminary injunction before the sale.[1]

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[1]Although the Rubals raised § 33-811(c) below as a bar to

(continued...)

Section 33-811(c) reads in pertinent part:

> The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed pursuant to [A.R.S.] § 33-809 shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. Mountain standard time on the last business day before the scheduled date of the sale.

¶13 It is undisputed that Maher did not seek, much less obtain, a preliminary injunction pursuant to Rule 65, Ariz. R. Civ. P., before the October 2003 trustee's sale. Thus, by the statute's plain language, he has waived any defense or objection to the sale. Maher asserts, however, that § 33-811(c) does not apply to his claims because the trustee's sale is void.[2]

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[1](...continued)
Maher's claims, the trial court did not rely on that subsection in granting judgment in favor of the defendants. We may nonetheless affirm the court's ruling for any reason supported by the record. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App.2001).

[2]Maher argues that sale is void for two reasons: (1) Bank One lacked authority to conduct the sale because it was not the same entity with which he had contracted, and (2) Bank One had failed to comply

(continued...)

He reasons–absent any citation to authority–that "a procedural statute such as § 33-811[(C)] cannot create title where none exists" and "[t]he voidness of the sale can be raised at any time." *See* Ariz. R. Civ. App.P. 13(a)(6) (appellant's brief shall contain citation to authority). But Maher's proposed limitation on the scope of § 33-811(C) is unreasonable in any event.

¶14 It is true that the provisions governing trustee's sales must be strictly observed or any sale is void. *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix,* 118 Ariz. 473, 476, 578 P.2d 152, 155 (1978). Thus, a trustee's failure to comply with those provisions is a defense or ground for objection to the sale, but, under § 33-811(C), the objecting party must seek an injunction pursuant to Rule 65 before the sale is held. To permit a trustor to void a sale based on a claim that those provisions were violated, after the trustor failed to seek and obtain a preliminary injunction, would render § 33-811(C) a practical nullity. *See Mejak v. Granville*, 212 Ariz. 555, ¶9, 136 P.3d 874, 876 (2006) ("We must interpret the statute so that no provision is rendered meaningless, insignificant, or void.")

¶15 Notably, subsection (C) was added to § 33-811 in 2002–nearly a quarter-century after *Patton*

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[2](...continued)
with various notice requirements enumerated in Title 33.

was decided. *See* 2002 Ariz. Sess. Laws, ch. 259, § 3. We presume the legislature is aware of existing law and of court decisions interpreting a statute and it intends to change the law when it amends a statute. *See Daou v. Harris*, 139 Ariz. 353, 357, 678 P.2d 934, 938 (1984) ("[W]e presume that the legislature, when it passes a statute, knows the existing laws."); *Ariz. Press Club, Inc. V. Ariz. Bd. Of Tax Appeals*, 113 Ariz. 545, 548, 558 P.2d 697, 700 (1976) (["I]t is a principle of statutory construction that the legislature is presumed to be aware of court decisions interpreting the language of [a] statue..."); *State v. Hamblin*, 217 Ariz. 481, ¶11, 176 P.3d 49, 52 (App. 2008) (we presume legislature intends to change law when it substantively changes statutory language). Therefore, given the legislature's awareness that certain objections or defenses to a trustee's sale would provide a basis to void the sale under *Patton,* had it intended for the waiver provision in § 33-811(C) not to apply to such objections and defenses, it would have said so specifically.

¶16 Moreover, Maher cites no authority suggesting a claim of title under an otherwise-invalid conveyance or deed cannot be validated by operation of statute; indeed, his position is contradicted by existing law. For example, a person may, with the passage of time, obtain good title to property, even when that person originally held void or defective title or even no title at all. *See* A.R.S. § 12-

523(A) (prescribing statute of limitations for "action to recover real property from a person in peaceable and adverse possession under title or color of title"); A.R.S. § 12-524 (statute of limitations to "recover a lot located in a city or town from a person having a recorded deed therefor, who claims ownership and has paid the taxes thereon"); A.R.S. § 12-526(A) (statute of limitations for action to recover land "from a person having peaceable and adverse possession thereof"); *Nicholas v. Giles*, 102 Ariz. 130, 133-134, 426 P.2d 398, 401-02 (1967) (void deed qualifies as recorded deed under § 12-524, which allows claimant to bring action for title after paying taxes on property); *Henderson v. Tejada*, 26 Ariz. App. 462, 466, 549 P.2d 242, 246 (1976) (color of title "requires a chin of title back to the sovereign of the soil, although the chain may be defective"). Thus, it is plainly within the legislature's power to allow a person to acquire good title to real property based on another's failure to act timely. We therefore find no reasoned basis to restrict the application of § 33-811(C) in the fashion Maher urges.

¶17 Maher additionally asserts § 33-811(C) does not apply to his claims because he "did not receive proper advance notice of the sale." But § 33-811(C) does not require that the trustor have had actual notice of the sale for its waiver provision to apply. We recognize, however, that the absence of a notice

requirement in § 33-811(C) raises possible due process concerns.[3] *See Curtis v. Richardson*, 212 Ariz. 308, ¶ 16, 131 P.3d 480, 484 (App.2006) ("Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner."). But it is plain from the record–viewed in the light most favorable to Maher–that he had, at a minimum, actual notice of the sale approximately one month before it occurred. On September 28, 2003, Maher sent a letter to Bank One's attorney acknowledging his receipt of a letter dated September 16 reminding him of the date of the sale.

¶18 Bank One also complied with the requirement in A.R.S. § 33-809(C) that, within five days of recording the notice of sale, it mail a copy of the notice to Maher "by certified or registered mail." Maher failed to accept or claim the letter containing that notice or any of the subsequent correspondence sent to him by certified mail. But, in a July 16 letter to Bank One, he admitted he had received at least one notice from the United States Postal Service of a certified letter for him from Bank One's attorney. *Cf. Transamerica Fin. Servs., Inc. V. Lafferty*, 175 Ariz. 310, 313-14, 856 P.2d 1188, 1191-82 (App. 1993) (sending trustee's

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[3]To the extent Maher argues his due process rights would be violated if § 33-811(C) applied to bar his claims, he cites no supporting authority. *See* Ariz. R.Civ.App.P.13(a)(6).

notice of sale to trustor's last known address complied with statutory requirements despite notice's being returned undelivered).

¶19 Plainly, any delay in Maher's receiving notice of the sale was a result of his intransigence and not Bank One's failure to comply with governing law. Thus, the lack of an explicit notice requirement in § 33-811(C) raises no due process concerns here. *See Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 261, 772 P.2d 1104 (1989) ("Due process commands that 'notice be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action...'"), *quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (alteration in *Dixon*); *cf. Jay v. Kreigh*, 110 Ariz. 299, 303, 518 P.2d 122, 126 (1974) (party not injured by allegedly unconstitutional statute lacks standing to challenge its constitutionality).

¶20 Maher cites several cases in which a party was permitted to bring an action to set aside a trustee's sale after the sale had occurred, reasoning that §33-811(C) therefore cannot bar his claims. But each of the cases Maher cites addressed events that occurred before § 33-811 was amended to add the waiver provision in subsection (C). *See* 2002 Ariz. Sess. Laws, ch. 259, § 3; *Krohn v. Sweetheart Props., LTD*, 203 Ariz. 205, ¶ 4, 52 P.3d 774, 775-76 (2002); *Eardley v. Greenberg*, 164 Ariz.

261, 263, 792 P.2d 724, 726 (1990); *In re Hills.* 299 B.R. 581, 582-83 (Bankr. D. Ariz. 2002). The cases are therefore inapposite. Accordingly, we conclude Maher has waived any objection or defense to the trustee's sale because he failed to seek a preliminary injunction pursuant to Rule 65 before the sale was held. We now examine each of his remaining claims in turn to determine if it is an objection or defense to the sale and therefore waived.

Quiet Title and Title 33 Claims

¶21 Maher's first claim, for quiet title, alleges Bank One was not the successor in interest to Bank One, Arizona and therefore lacked authority to conduct the trustee's sale. The relief Maher seeks is to have the sale set asise and title restored to him. His quiet title claim is clearly barred by § 33-811(C). He also seeks rescission of the sale as a remedy for Bank One's alleged violations of Title 33. He has waived that claim as well. That Maher is also seeking damages for the alleged Title 33 violations does not change this result. Section 33-811(C) waives "all defenses and objections to the sale," without limiting that waiver to a particular action or according to the specific relief sought; it does not, for example, differentiate an action seeking to set aside a sale from a action seeking damages. We find no authority, and Maher cites none, suggesting we should interpret the waiver

provision in § 33-811(C) so narrowly. Indeed, to do so would contravene the purpose of the statutes governing deeds of trust and trustee's sales–"to provide relatively inexpensive and speedy foreclosure proceedings." *Andreola v. Ariz. Bank*, 26 Ariz. Apop. 556, 559, 550 P.2d 110, 113 (1976); *see also LeDesma v. Pioneer Nat'l Title Ins. Co.*, 129 Ariz. 171, 173-74, 629 P.2d 1007, 1009-10 (App. 1981). Thus, because Maher has waived any defense or objection to the sale pursuant to § 33-811(C), we conclude he has also necessarily waived any claim for damages dependent on facts he could have raised as a defense or objection to the sale.

Contract Claims

¶22 Maher asserts Bank One breached the home equity loan agreement by instituting the trustee's sale despite his ongoing dispute with the bank over its disclosure of confidential account information to his spouse. Although he does not seek rescission of the sale as a remedy on this claim, the claim nonetheless requires Maher to prove the sale was improper. And, were the sale improper, he could have raised the impropriety in an action to enjoin the sale. *See generally* A.R.S. §§ 12-1801, 12-1805. He has therefore waived this breach of contract claim.[4] *See* § 33-811(C).

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[4]This claim fails on its merits in any event. Maher asserts that,

(continued...)

His remaining breach of contract claim–that Bank One violated the contract's terms by failing to notify him of Bank One's merger with Bank One, Arizona–would not, however, provide a valid defense to the sale. Therefore, his breach of contract claim based on that allegation is not barred by § 33-811(C).

¶23 Nonetheless, the trial court did not err in granting summary judgment in favor of Bank One on this claim. Maher's loan agreement with Bank One, Arizona states the contract "may not be supplemented or modified except in writing." Maher asserts this provision required Bank One to notify him of "material changes to the contract," specifically including its merger with Bank One, Arizona. But this provision cannot reasonably be read as requiring Bank One to give Maher notice of the merger. It instead is part of an integration clause that precludes as additional contract terms any previous extrinsic or collateral representations or any subsequent changes to the contract not agreed to by both parties in writing. *See generally* Arthur L.

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[4](...continued)
under the contract, he was permitted to withhold loan payments while any dispute with the bank was pending, and, therefore, he properly withheld loan payments because Bank One had not, at least to his satisfaction, resolved his complaint that it wrongly had disclosed confidential information to his spouse. But the contract provision on which Maher relies clearly applies only to disputes over the amount of the payment due and not to the type of dispute Maher describes.

Corbin, *Corbin on Contracts* §578 (interim ed. 2002)("If a written document...declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations, warranties, or collateral provisions..., this declaration is conclusive...").

¶24 Even assuming Bank One were required to notify Maher of an material change to the contract, the merger did not constitute such a change. Under federal law governing the merger and consolidation of bank, *see generally* 12 U.S.C. §§ 215 through 215c, Bank One is "deemed to be the same corporation" as Bank One, Arizona, with Bank One having the same "rights, franchises, and interests of [Bank One, Arizona] in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in [Bank One] by virtue of such consolidation without any deed or other transfer." 12 U.S.C. § 215(e); *cf.* A.R.S. §6-212 (rights and liabilities of state bank merging with national bank "prescribed at the time of the action by the law of the United States"); A.R.S. § 6-216 (resulting bank "shall be considered the same business and corporate entity as each merging bank or converting bank").

¶25 Moreover, even if the merger could be considered a material change in the contract because it arguably transferred rights from

Bank One, Arizona to Bank One, the contract expressly reserved to Bank One, Arizona the right to "sell or transfer [Maher's] Credit Lien Account to another lender, entity, or person, and to assign [its] rights under this Agreement and the Deed of Trust""[w]ithout notice or prior approval from [Maher]." This specific provision qualifies any general duty Bank One might otherwise have had under the contract to notify Maher of the merger. *See Guo v. Maricopa County Med. Ctr.*, 196 Ariz. 11, ¶ 17, 992 P.2d 11,15 (App. 1999) ("Where there is inconsistency between two provisions in a contract, we will construe the more specific provision to qualify the more general provision."). In short, under any reasonable interpretation of the contract, Bank One was not required to give Maher notice of the merger and could not have breached the contract by failing to do so.

FDCPA Claims

¶26 Last, Maher's damages claims in count four, alleging Bank One violated the FDCPA, would not provide a basis to prevent or set aside the trustee's sale; therefore, he has not waived these claims under § 33-811(C). This conclusion, however, does not end our inquiry. Maher's FDCPA claims concerned actions taken in 2003 by Bank One through its attorney Larry Folks. The trial court dismissed those claims after concluding, inter alia, that they were barred because Maher

had failed to bring them within the applicable one-year statute of limitations. *See* 15 U.S.C. § 1692k(d). Maher does not dispute this conclusion in his opening brief. Nonetheless, he claims in his reply brief that the statute of limitations does not bar his FDCPA claims. Apparently referring to the fact that Folks was Bank One's attorney and had been named by the bank as the successor trustee on Maher's deed of trust, Maher argues that he "had no reason or way to know" the relationship between Folks and Bank One "until after he was able to conduct discovery."

¶27 We generally consider arguments raised for the first time in a reply brief waived. *See Duwyenie v. Moran*, 220 Ariz. 501, n.3, 207 P.3d 754, 756 n.3 (app. 2009). Maher, moreover, has failed to cite any authority in support of his argument or to develop it in any meaningful way. *See Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P3d 101, 108 n.5(App. 2006) (undeveloped arguments waived; *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85,93 (App. 2000)(same). In any event, even assuming Maher's knowing the nature of the relationship between Bank One and Folks was material to his discovering this FDCPA claims against the bank and that the statute of limitations should not begin to run until he learned that information, the trial court correctly concluded his claim was time-barred.

¶28 We review de novo a trial court's grant of summary judgment based on the statute of limitations. *See Andrews v. Eddie's Place, Inc.*, 199 Ariz. 240, ¶ 1, 16 P.3d 801, 802 (App. 2000). Generally, a plaintiff must file claims under the FDCPA within one year of the violation. 15 U.S.C. § 1692k(d). However, the statute of limitations under § 1692k(d) may be tolled until the plaintiff "discovered or had reasonable opportunity to discover" the facts underlying his or her claims. *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783, 799-800 (S.D. Ohio 2006); *see generally CDT, Inc. V. Addison, Roberts & Ludvig, C.P.A., P.C.*, 198 Ariz. 173, ¶ 7, 7 p.3d 979, 982 (App. 2000) (under "discovery rule," statute of limitations begins to run when plaintiff knew or should have known of cause of action).

¶29 Maher does not specify when he "discover[ed]" the relationship between Bank One and Folks, other than asserting he did not learn of it "until soon before he filed the present lawsuit in 2006." But Maher cites, and we have found, nothing in the records supporting that assertion. In exhibits submitted to the trial court, Maher acknowledged receipt in July 2003 of a debt-collection letter from Folks, in which Folks identified himself as an attorney "represent[ing] Bank One." In Maher's opening brief, filed in March 2004 in his previous appeal before this court, Maher noted that Folks had been appointed successor trustee under the deed of trust to Maher's

house. Maher does not dispute that he knew all other facts necessary to the discovery of his FDCPA claims by at least that date. Thus, Maher had discovered the facts underlying those claims by March 2004 at the latest. But he did not file his complaint in this case until July 2006, more than two years after his FDCPA claims had accrued. Consequently, we cannot say the trial court erred in concluding § 1692k(d) barred Maher's FDCPA claims and therefore granting summary judgment in favor of Bank One on those claims.

Motion to Continue

¶30 Maher additionally argues the trial court erred in granting summary judgment "without requiring [Bank One] to provide relevant discovery." However, nothing in the record suggests that the evidence sought by Maher's pending discovery requests would have been relevant to his two claims not barred by § 33-811(C). Even assuming the evidence would be relevant to those claims, the trial court did not err. Before oral argument on the motions for summary judgment, Maher asked the court to delay its decision on those motions to give Bank One more time to respond to his pending discovery requests, asserting the requested information was relevant to his claims. But a party seeking to defer a summary judgment ruling because it "cannot...present by affidavit facts essential to justify [its] opposition" to

summary judgment, Ariz. R. Civ. P. 56(f), must file an affidavit in support of that request "specifically describing the reasons justifying delay," including what the party believes the evidence would reveal. *Grand v. Nacchio*, 214 Ariz. 9, ¶72, 147 P.3d 763, 783 (App. 2006); *see also Magellan S. Mountain Ltd. P'ship v. Maricopa County*, 192 Ariz. 499, ¶ 10, 968 P.2d 103, 106 (App. 1998). Maher filed no such affidavit.

¶31 Moreover, the information he sought was equally relevant to his own pending motion for summary judgment, which he had filed before either Bank One or the Rubals had filed their motions. Rule 56(f) only permits granting a continuance to a party opposing summary judgment. The trial court was not required to delay its ruling because Maher had insufficient evidence available to support his position on factual issues he initially had raised in his own motion for summary judgment. For these reasons, the trial court did not abuse its discretion in denying Maher's request to delay its ruling on the summary judgment motions. *See Maricopa Coutny v. Kinko's Inc.*, 203 Ariz. 496, ¶ 19, 56 P.3d 70, 75 (App. 2002)("We apply an abuse of discretion standard of review to a denial of relief under Rule 56(f).").

Disposition

¶32 We affirm the trial court's grant of summary

judgment in favor of Bank One and the Rubals. We grant Bank One's request for reasonable attorney fees on appeal pursuant to the provisions of the contract and deed of trust, pending Bank One's compliance with Rule 21(c), Ariz. R. Civ. App. P. We deny the Rubals' request for attorney fees made pursuant to A.R.S. § 12-349. Maher's arguments on appeal, although unavailing, were not frivolous, and nothing in the record suggests he brought his appeal "solely or primarily for delay or harassment" or that he "[u]nreasonably expand[ed] or delay[ed] the proceedings." § 12-349(A). And, in our discretion, we deny the Rubals' request for attorney fees pursuant to A.R.S. § 12-341.01.

_____

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____

PETER J. ECKERSTROM, Presiding Judge

_____

GARYE L. VASQUEZ, Judge

APPENDIX D

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ORDER, September 28, 2008. . . . . D-1

ORDER, October 14, 2008. . . . . D-6

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GRAHAM

STEVEN MAHER, Plaintiff, vs. BANK ONE, N.A., a foreign corporation; Does 1-5. Defendants.	)	No. CV2006-193 ORDER

This Court has previously issued its Order in this matter granting Summary Judgment to both Defendants, denying Plaintiff's Motion for Summary Judgment and ordering Plaintiff to pay Defendants' legal costs and attorney's fees. Subsequently a Motion for New Trial was filed by Plaintiff asking this Court to review its previous Order and enumerating perceived errors, both in law and facts, which would justify revision or withdrawal of the earlier Order.

Hearing has been held and numerous documents and memoranda have been filed by all parties and reviewed by this Court. Three areas are alleged as causes for reversal: (1) irregularity in proceeding; (2) newly discovered evidence; and (3) findings not justified by evidence or contrary to law. These appear to break down into issues regarding the

trustee's sale (the major area of argument); newly discovered evidence dealing with information given or available to the Rubals when they purchased the property; and disagreements with the findings of the Court in areas of dispute. No procedural irregularities are asserted.

Oral argument was held in which these issues were presented and additional documents and arguments received following those proceedings and these have also been considered and studied by the Court.

Virtually the entire matter boils down to the legality and validity of the Trustee's Sale. If that is accepted by the Court nearly all the claims by the Plaintiff become irrelevant. Clearly if the sale was valid the claims against Rubals cannot survive since Plaintiff would have not standing to object to the sale of the property owned by the Bank. Also, if the sale is legal, the claims under the Fair Debt Collections Practice [sic] Act do not apply since they should have been raised prior to the sale, not afterward. Even without that fact, claims under that Act have a one year statute of limitations which would bar raising them at this stage of the case (15 U.S.C. Sec. 1692k). Once the valid Trustee's Sale is accomplished, Title 33 presumptively establishes that the requirements under Arizona deed of trust and foreclosures statutes have been met (*Security Savings and Loan Association v. Milton*, 171 Ariz/.75. 828 P.2d 1216; *Hills v. Ocwen*, 299 B.R. 581); *A.R.S.* 33-811(B).

The Court finds that the Trustee's Sale was legal and valid. The Court repeats its earlier findings that the contractual agreement between Plaintiff and Defendant Bank granted Bank permission to, without notice, transfer or sell his account to any other person or institution. This was done when Bank One of Arizona (which had previously been Valley National Bank; apparently Plaintiff had no problem when that change occurred because he continued to bank in the same bank with the same people) merged with Bank One

of Utah, N.A. to create a new entity: Bank One, N.A. Two letters from the United States Office of the Comptroller of Currency confirm the name of that entity as Bank One, N.A. (Plaintiff's Exhibit J and Chase Home Finance Supplemental Submission, Exhibit 1). This is the same name that was on the Complaint filed herein and the same name placed on the Notice of Trustee's Sale and notices to Plaintiff regarding that sale (See Notice of Breach of Non-Performance, Rubals' Exhibit 11 and Notice of Substitution of Trustee, and Notice of Trustee Sale, Rubals' Exhibit 5).

The evidence is not disputed that Plaintiff had utilized the bank's service for 16 months during which there had been an unauthorized disclosure of confidential information to his wife and the bank had accepted his payments, credited them appropriately to his account, charged the proper interest and he suffered no damages to that account during this time. After complaining about this breach of confidentiality the bank moved within a short time to correct the situation, removed the information from the wife's account and apologized. Plaintiff insisted the bank zero out his line of credit account (then showing a debt of over $50,000) to compensate him for his perceived damages before he would resume his regular payments. On several occasions he was told the bank would not grant him this request and that he needed to resume payments or suffer the consequences. The Court has already found that there was no legal justification for his refusal to pay in that the argument he had with the bank was over the breach of confidentiality and not over the account which was disclosed. There is ample evidence that Plaintiff was notified several times of his need to pay on the account, that a Trustee's Sale would be held, and that he refused to accept certified letters to that effect. He was, however, physically present at the sale and his letters show he knew of the pending sale at least a month ahead of time and, although he objected at the sale, he

made no legal efforts to stop the sale or contest its legality. Letters of complaint to the bank or vocal objections at the sale do not constitute legal action under the law.

The Court has also found that failure to notify Plaintiff of a change in name caused by a merger is not grounds for "modification of the contract" between him and the bank. He still maintained a satisfactory relationship with the bank, the personnel were the same, the location was the same, and aside from the confidentiality situation, no complaints were registered. The bank's right to sell or transfer the account is a specific right while the right to be informed of any significant change in the contract is a general statement which is subject to the exceptions set forth in the contract and also agreed to by both parties.

The legality of the Trustee's Sale is established by the Trustee's Deed which issued after the sale. By statute and judicial decisions it presumptively establishes that all procedural matters were complied with and the sale was conducted regularly and in accordance with the required statutory notice provisions (See prior citations).

For all the above reasons the Court reaffirms its prior order with one exception. In the first Order the Court awarded legal costs and attorney's fees to both Defendants. The Court, after further consideration is unable to find legal justification for attorney's fees to Defendants Rubal. The action involving them is not based on contractual issues as is the dispute between Plaintiffs and Bank One. No legal basis has been brought forward by Rubals or their counsel to suggest otherwise. Consequently, both Defendants are awarded Summary Judgment in this case while Plaintiff's Motion for Summary Judgment and Partial Summary Judgment is denied. The Court further awards both Defendants their legal costs and the Bank is awarded reasonable attorney's fees herein. Affidavits of costs and expenses previously submitted need not be duplicated and

additional expenses should be filed within ten (10) days of this order. Plaintiff shall have ten (10) days after receipt of the claimed expenses to file objections.

Dated this 18th day of September, 2008

_____

C. Robert Pursley
Judge of the Superior Court

Copies of the above mailed
this ___ Day of September, 2008, to:

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GRAHAM

STEVEN MAHER,	)	
	)	No. CV2006-193
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
BANK ONE, N.A., a foreign corporation; Does 1-5.	)	
	)	
Defendants.	)	

The Court has been advised that some pleadings filed herein failed to be property placed in the County's files and may not have been seen prior to the Court's Order of September 18, 2008. The Court has now reviewed again the documents in this case, including Plaintiff's Notice of Filing Exhibits filed on September 11, 2008, and affirms that those were read and considered prior to its Order.

One document was found which had not previously been examined. This was Defendant Rubals' Memorandum in Support of Attorney's Fees. It was specifically mentioned in the Order denying attorney's fees that no "suggestions" had been made by Rubals' counsel to aid the Court in determining justification for an award of attorney's fees inasmuch as no contractual relationship existed between them and Plaintiff. After review of the Memorandum and

the cases and statutes cited therein, the Court hereby finds that this case has its genesis in a contractual relationship between Plaintiff and Bank and without that relationship the Rubals could not have been sued separately. Consequently they are entitle to an award of attorney's fees as originally ordered by this Court. Defendants Rubal are to file a second affidavit of legal costs and attorney's fees incurred as a result of the Plaintiff's Motion for New Trial. This affidavit is to be received by this Court prior to 5:00 p.m., October 24, 2008.

The Court has examined the file and can find no affidavit of costs and legal fees from Chase Bank regarding those costs incurred as a result of the Motion for New Trial. It is possible that is one of the misplaced documents and has not yet been located. If such is the case, and one was submitted within the 10 days allotted by the Court, a copy must be filed again with this Court on or before 5:00 p.m. October 24, 2008. This is not an extension of time originally given and if not earlier filing occurred the Court will use the figures previously provided to determine a fair order for attorney's fees and legal costs.

The Court has seen and examined Plaintiff's Second Motion for New Trial, filed on October 14, 2008. That Motion is denied as the issues raised have been argued previously on several occasions and have been denied.

Plaintiff has filed a Motion to Supplement Record on Appeal (filed October 9, 2008) and a Notice of Appeal (filed October 14, 2008). Normally the filing of a Notice of Appeal immediately transfers jurisdiction from the trial court to the Court of Appeals. In this case, however, there is no final Order to appeal. Until the Court issues a Judgment re costs and attorney's fees it is this Court's opinion that there is no appealable Order. Unless convinced otherwise, this Court will hold the Notice of Appeal until the final Order and Judgment are entered and will then consider it filed

officially and begin the appellate process. The Motion to Supplement the Record on Appeal must be directed to the Court of Appeal following the Notice of Appeal and not to the Superior court.

DATED this 14th day of October, 2008

C. Robert Pursley
Judge of the Superior Court

Copies of the above mailed to:

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Attorney for Defendant Chase Bank

APPENDIX E

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ORDER, July 15, 2008. . . . . E-1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GRAHAM

STEVEN MAHER,	)	
	)	No. CV2006-193
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
BANK ONE, N.A., a foreign corporation; Does 1-5.	)	
	)	
Defendants.	)	
	)	

There are no serious contentions regarding the facts of this case and this Court adopts the time sequence as set forth in Plaintiff's "Time Line" submitted to the Court at its last hearing in order to provide a reference as to all events involved in this lengthy proceeding. Exhibits referred to herein will be based on the number provided by Plaintiff in his Notice of Filing Exhibits filed on November 11, 2007, unless other wise note.

FACTS:

On or about April 15, 1999, Plaintiff contracted with Bank of Arizona, Safford Branch, for a Home Equity Line of Credit (Exhibit B) and borrowed $97,500 using his residence as collateral and secured by a Deed of Trust (See Affidavit of

Plaintiff filed November 14, 2006, page 2). This home was Plaintiff's sole and separate property and Plaintiff requested that the bank not disclose any information regarding this loan to his then-present wife. Plaintiff's Affidavit further asserts that he chose this bank because of prior dealings and its status as a "local" bank where he trusted the employees. He initially made his regular payments on time (sometimes before due and for more than the payment required).

On approximately November 9, 2001, Bank One of Arizona merged with another bank (the details of this transaction are unclear as to the exact parties but the institution was known as Bank One and for convenience this Order will use "Bank" generically unless otherwise stated). Plaintiff was not personally advised of this change of ownership. On November 26, 2001, this new institution attempted to consolidate some of its accounts and in doing so disclosed to Plaintiff's wife information regarding this account which he had specifically asked to be kept from her. This was not discovered by Plaintiff until February 18, 2003, nearly 16 months after the breach of confidentiality began. During these 16 months all payments on the account had been made regularly and in full and Plaintiff received credit in full for each and every payment made. On March 3, 2003, after voicing his complaint about the breach of confidentiality to the bank in February, Plaintiff began withholding payments on the account and no further payments were ever made. There is no dispute that Plaintiff's payments were property credited to his account and that the balance left unpaid was never paid or reduced by further payments by him.

Plaintiff refused to make further payments relying on a clause in his contract (Exhibit B, page 6) regarding conflict resolutions. It reads as follows: "If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet at 321 Main St.,

Safford, AZ 85546 or at the address on your bill...After we receive your letter, we cannot try to collect any amount you questions, or report you as delinquent. We can continue to bill you for the amount you questions, including finance charges, and we can apply any unpaid amount against your Credit Limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question." It is Plaintiff's position that his matter was never resolved and that he was therefore not required to make any payments until it was settled.

After several letters seeking payment Bank recorded on July 16, 2003, a Notice of Trustee's Sale (Exhibit F) along with a Notice of a substitution trustee (Exhibit G of Bank's Controverting Statement of Facts in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed Jan. 18, 2008). In these letters the Bank advised Plaintiff that it had confirmed that the unauthorized disclosure of information had been halted and that they had closed out their investigation of his complaint. On September 28, 2003, Plaintiff wrote to Bank stating that he was aware of the scheduled Trustees Sale on October 16, 2003. Apparently at least two registered mail letters notifying Plaintiff of these filings were sent and both returned "Unclaimed".

A Trustee's Sale was held as scheduled, Plaintiff being present at the time, and the home was sold to Bank for the amount then owed. Plaintiff refused to vacate the property and a Forcible Entry and Detainer action was filed by Bank on November 12, 2003, with a hearing on December 4, 2003 (Graham County Action CV2003-165) and ruling was made in favor of Bank. This matter was appealed and the Court of Appeals affirmed the ruling. Further post-trial hearings were held to clarify the trial court's rulings, all resulting in sustaining the legality of the foreclosure and subsequent trustee's sale. On June 8, 2004 the sale of the

property to Defendants [sic]Jubal was closed and they became the owners after purchasing it from Bank.

ARGUMENT:

Plaintiff seeks to set aside the Trustee's Sale and the subsequent sale of the home to Jubals [sic] based on his interpretation of the contract between him and the Bank which authorized him to withhold payments as long as the dispute remains unresolved regarding "...any amount you (the borrower) question". He argues that (1) the merger into another legal entity violated his contract in that he received no notice prior to it being done, and (2) the unauthorized disclosure of confidential information was never resolved. There are a number of allegations of legal challenges to the later sale of the Property to Jubals [sic], but they all hinge on the invalidity of the Trustee Sale. If that sale was legal then the Bank was the owner and had every right to sell their property. Both parties have filed Motions for Summary Judgment (or Partial Summary Judgment) dealing with these issues and so the Court will address those matters first.

The question of failure to notify Plaintiff of the merger is dealt with by reference to the contract entered into between him and the Bank (Exhibit B, page 5-note: page 5 is missing from the Court's copy of Exhibit B but can be found in other exhibits filed herein by other parties). This Transfer or Assignments clause states that "without prior notice or approval from you (borrower), we (lenders) reserve the right to sell or transfer your Credit Line Account to another lender, entity or person, and to assign your rights under the Agreement and the Deed of Trust." (Emphasis added) Assuming Plaintiff read his contract as carefully as he indicates he entered into this agreement he would have been advised at the outset that this was a possibility, and not only could it have been transferred to another bank but to an

"entity or person". Arguments related to the merger and which Bank One was which are therefore meaningless. So long as Plaintiff was given proper credit for any payments made it mattered not who owned the papers on the debt. By signing this agreement Plaintiff gave up his rights to notice of the merger. It should also be pointed out that he continued for over a year doing business with the same individuals, with the same satisfactory result, even after the merger without noticing the difference. It was only the breach of confidentiality that made him aware of the change of ownership, and even that was much later in these proceedings. Finally, Plaintiff states that if he had been given notice he could have done any number of things to protect himself (change banks, pay off the debt, refinance, etc.), but the fact is that he did none of those things when he discovered the facts. He merely continued to argue with the bank and ignore his opportunities to do anything he mentioned and keep his home.

The problem seems to be that he had convinced himself that he could avoid a legal debt by continuing to argue with Bank. His theory seems to be that until he is satisfied he had a right to stop payments. The contract does not justify his position and neither does common sense in regard to business affairs. If Bank had to satisfy all their customers on any disagreement before it could collect its payments, even when pertaining to subjects unrelated to the payments themselves, they would be hard pressed to stay in business.

The dispute he had was not a dispute about the account on the loan. Apparently it was the disclosure of this account to his wife that triggered the dispute, but it had nothing to do with the account itself. Plaintiff has agreed that he has no quarrel with the total amount owed, the crediting of payments or the calculations of interest or any other matters relevant to the account itself. It is further

impossible to tell what he expected Bank to do about his complaint. In the correspondence there were apologies by Bank, there is nothing about damages suffered as a result of the breach of confidentiality that could be addressed by Bank, and the Bank said clearly at least twice that their investigation into his complaints were terminated and there was nothing more they could do and that Plaintiff should resume his payments. In spite of his vehement assertions of misbehavior on the part of Bank there is no indication that he wanted anything from Bank other than forgiveness of nearly fifty thousand dollars of debt. He told the Court that he "assumed" that Bank had stopped the improper disclosures when requested, but had made no effort to determine if that were true. He made no effort to take legal steps to stop the Trustee's Sale from going through in spite of knowing well over a month in advance that it was scheduled. While Plaintiff insists that the "entire amount owed" was in dispute in his correspondence he has also admitted that nothing in the account was in error. Consequently the Court can find no justification for failure to make his required payments to Bank.

The Court further finds that the Fair Debt Collections Practices Act does not apply to a foreclosure of a loan secured by a Deed of Trust which is covered by its own statutory requirements. The Trustee's Deed Upon Sale establishes evidence of Bank's compliance with those foreclosure statutes (A.R.S. 33-811(B)).

Accordingly the Court denies Plaintiff's Motion for Partial Summary Judgment and grants Bank's Motion for Summary Judgment.

Considering the above ruling, and the fact that there is a presumption (conclusive or not) of validity of a Trustee Sale (A.R.S. 33-811(c), the Court also grants Defendants Jubal [sic] their Motion for Summary Judgment in that Plaintiff has not overcome that presumption and therefore the

Bank was the legal owner at the time of sale to Jubals [sic].

The Court therefore rules in favor of Defendants and against Plaintiff and awards all Defendants their legal costs, including reasonable attorney's fees since this is basically an action based on contractual issues. Counsel for Chase is ordered to prepare a form of judgment, attaching thereto affidavits from both defense counsel regarding attorney's fees and provide a copy to Plaintiff's Counsel. Objections must be filed in accordance with the Rules of Civil Procedure or the proposed Judgment will be signed as presented.

Note: this Court has delayed issuing this Order for two weeks at the request of Plaintiff, but can find no justification for delaying longer since they have filed nothing in the interim. The issues they seek to respond refer only to the merger of the Bank that issue is not considered significant by this Court in reaching its conclusions.

DATED this 16th day of July, 2008.

C. Robert Pursley
Judge of the Superior Court

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APPENDIX F

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14th AMENDMENT TO THE UNITED STATES CONSTITUTION. F-1

14th AMENDMENT TO THE UNITED STATES CONSTITUTION (SECTION 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

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15 U.S.C.§ 1692g (a) and (b). G-1

15 U.S.C. § 1692g (a) and (b)

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing–

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed,

or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

APPENDIX H

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ARS §33-811 (B) and (C) H-1

ARS §33-811(B) and (C)

B. The price bid shall be paid at the office of the trustee or the trustee's agent, or any other reasonable place designated by the trustee. The payment of the bid price may be made at a later time if agreed upon in writing by the trustee. The trustee shall execute and deliver the trustee's deed to the purchaser within seven business days after receipt of payment by the trustee or the trustee's agent made in a form that is satisfactory to the trustee. The recording of the trustee's deed upon sale may also constitute delivery of the deed to the purchaser. The trustee is not liable for any damages resulting from the failure to record the trustee's deed upon sale after physical delivery of the deed to the purchaser. The trustee is not liable for any damages resulting from the failure to record the trustee's deed upon sale after physical delivery of the deed to the purchaser. The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust and this chapter relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale. A trustee's deed shall constitute conclusive evidence of the meeting of those requirements in favor of purchasers or encumbrancers for value and without actual notice. Knowledge of the trustee shall not be imputed to the beneficiary.

C. The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed pursuant to section 33-809 shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order

granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain standard time on the last business day before the scheduled date of the sale. A copy of the order, the application for the order and the complaint shall be delivered to the trustee within twenty-four hours after entering the order.